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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 301

S/A INDUSTRIAS REUNIDAS F. MATARAZZO,
Petitioner,

against

ARTHUR LEWIS LATIMER,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 19, 1949

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Preliminary Statement

The petitioner, S/A Industrias Reunidas F. Matarazzo, is a Brazilian corporation which transacted business in the Southern District of New York through its resident agent, Brazil Export Corporation. The principal activities conducted by the petitioner through its corporate agent consisted of making regular and extensive purchases of raw materials for use in the fabrication of finished products in its South American factories.

The order and judgment of the District Court, filed and entered on January 17, 1949, directed the dismissal of the complaint herein for lack of jurisdiction on the ground that the petitioner did not transact business in the Southern

District of New York at the time this action was commenced so as to be amenable to the service of process.

The District Judge, Slyvester J. Ryan, in his opinion conceded that Brazil Export Corporation was the "purchasing agent" for the petitioner (R. 119). He nevertheless was unable to accede to the validity of the contention advanced by the respondent that buying, conducted by a foreign corporation through a resident agent is as much an element of doing business as is the solicitation and consummation of sales.

The Court of Appeals reversed the order and judgment of the District Court which had dismissed the complaint herein and remanded the cause to the District Court for further proceedings in accordance with its opinion (175 Fed. 2d 184). The Court in an unanimous opinion written by Judge Learned Hand reiterated the doctrine enunciated in the case of *International Shoe Company* v. *State of Washington,* 326 U. S. 310, that corporate presence required in addition to the existence of regular and systematic local activities, a second factor which involved an "estimate of the inconveniences which would result from requiring a foreign corporation to defend where it has been sued". The Court of Appeals concluded that the activities conducted by the petitioner in the Southern District of New York were regular and systematic but remanded the cause to the District Court with a direction to hear further evidence on the second factor which involved the ascertainment of the "estimate of inconveniences" of the respective parties.

The petitioner failed to initiate action in compliance with the decree of the Court of Appeals which remanded the cause to the District Court for further proceedings and has requested a writ of certiorari issue from this Court to the Court of Appeals for the Second Circuit to review the decree of that Court entered on June 8, 1949.

Statement of Facts

1. The respondent is an individual residing in the State of Georgia and the petitioner is a corporation organized and existing pursuant to the laws of the Republic of Brazil with its principal office at Sao Paulo, Brazil.

2. The employment contract, the breach of which is the subject matter of this action, was executed on behalf of the petitioner by Brazil Export Corporation, as its resident agent in this jurisdiction (R. 68).

3. Service of process upon the petitioner was made by the service upon Brazil Export Corporation, a domestic corporation, with offices located in the Southern District of New York.

4. The relationship of Brazil Export Corporation, as resident agent of the petitioner herein, is indicated by the letterhead used by Brazil Export Corporation which describes Brazil Export Corporation as the "Exclusive Agents" for S/A Industrias Reunidas F. Matarazzo, and what is additionally significant, Brazil Export Corporation lists its cable address on its letterhead as "Matarazzo", which is the principal part of the petitioner's corporate name (R. 69, 70). The petitioner explained that the use of the word "Matarazzo" as a cable address was a mere coincidence in that both the principal stockholder of the petitioner and the principal stockholder of Brazil Export Corporation possessed the surname Matarazzo and were cousins (R. 90).

5. The name of the petitioner, S/A Industrias Reunidas F. Matarazzo, appeared in prominent lettering on Brazil Export Corporation's office door at 50 Broadway, New York City (R. 69). The petitioner asserts that the names of two other corporations for which Brazil Export Corporation acted as agent also appear on its office door (R. 88). A statement in the petitioner's moving affidavit clearly con-

cedes that Brazil Export Corporation does act as an agent for the petitioner (R. 88).

6. The report and balance sheet of the petitioner, S/A Industrias Reunidas F. Matarazzo, for the year 1947 explicitly states that the petitioner maintained an agency in the City of New York as well as in certain other cities (R. 70).

7. The petitioner, S/A Industrias Reunidas F. Matarazzo, maintained a bank account at the Chemical Bank & Trust Company from November 20, 1946 to the date of the commencement of this action; other bank accounts were maintained in New York City by the petitioner as late as June, 1948 (R. 70, 71). The petitioner initially denied that it maintained any bank account in this city or state (R. 54). A supplemental affidavit by the petitioner reversed its original position on this point and conceded that the petitioner did maintain a bank account in New York City (R. 91).

8. The petitioner, through its resident agent, Brazil Export Corporation, regularly and systematically negotiated and concluded substantial purchases in this jurisdiction which in 1947 alone reached the impressive figure of approximately $10,000,000 (R. 71, 72).

Questions Presented

1. Is the decree of the Court of Appeals interlocutory and therefore not subject to review by this Court?

2. Is the decision of the Court of Appeals in conflict with the decisions of this Court?

POINT I

The decree of the Court of Appeals is interlocutory and is therefore not subject to review by this Court.

It is a cardinal principle of an appellate procedure that a review may be had only of final judgments and decrees. Cyclopedia of Federal Procedure, Volume 10, page 207 *et seq.* This Court has repeatedly stated that "the very foundation of our judicial system * * * in relation to appeals and writs of error has been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal." *McLish* v. *Roff*, 141 U. S. 661. It is only rigid adherence to such a doctrine that permits this Court to dispose of the awesome amount of litigation confronting it.

The Court of Appeals in the instant case concluded that the petitioner's activities through its corporate agent within the Southern District of New York were such as to indicate its presence there. It remanded the cause, however, to the District Court for a further hearing as to the "estimate of inconveniences" factor which constitutes an element upon which *in personam* jurisdiction is predicated. The following excerpt from the opinion of the Court of Appeals in the instant case contains the specific direction for a further disposition of the matter by the District Court:

> "The court will assume that the defendant carries on a continuous business in New York, but it will hear the parties as to whether the circumstances are such as would support a plea, *forum non conveniens*, if it had so pleaded in an action where jurisdiction was unquestioned."

It is apparent from the above-quoted direction of the Court of Appeals that its decree was not final but merely interlocutory. It did not dispose of the matter but merely directed that the District Court hear further testimony per-

taining to the matter before deciding whether or not the petitioner was present in the Southern District of New York for jurisdictional purposes. *Rexford* v. *Brunswick-Balke-Collender Co.*, 228 U. S. 339.

It would be difficult indeed to conceive of a more illustrative instance of an interlocutory decree than that which is now presented to this Court by the petitioner.

POINT II

The decision of the Court of Appeals in the instant case is consistent with the decisions of this Court.

In 1945, this Court in the case of *International Shoe Co.* v. *State of Washington, et al.*, 326 U. S. 310, reviewed and restated the nature of corporate activities requisite to establish a corporation's presence in a jurisdiction for the purpose of serving process. The Court in that decision adopted the view that due process is satisfied when there are systematic and continuous activities which establish sufficient contacts with a jurisdiction to enforce obligations which were incurred therein. The Court further stated that an "estimate of the inconveniences" was a requisite factor to be considered in predicating jurisdiction. It has been held that the substance and not the mere form of the medium through which a corporation conducts its activities in a jurisdiction shall be the decisive factor. *Bach* v. *Friden Calculating Mach. Co., Inc.*, 167 F. 2d 679.

It was by the application of the precise test of corporate presence enunciated by this Court in the *International Shoe* case that the Court of Appeals arrived at its decision in the instant case. Indeed, it was the Court of Appeals for the Second Circuit that formulated the doctrine which was adopted by this Court in the *International Shoe* case.

The Court of Appeals held that the petitioner's purchasing activities conducted through its resident corporate agent, which in one year alone reached the impressive figure of $10,000,000, constituted such a contact with the Southern

District of New York as to make it fair and reasonable to be sued in that jurisdiction. It remanded the cause to the District Court to hear further testimony on the "estimate of inconveniences" factor.

The petitioner herein has contended that its activity within the Southern District of New York which mainly consisted of the regular and systematic purchases of raw materials, is to be distinguished from corporate activity which related to the negotiation and consummation of sales. This distinction was denied by the Court of Appeals.

It is respectfully submitted that the regular and systematic negotiation and consummation of purchases by the petitioner through its resident agent, Brazil Export Corporation, constituted doing business as effectively as solicitation looking toward sale of its finished product. There can be little doubt from a factual point of view that purchases are as important and as inherently a part of doing business as any other segment of corporate activity. Certainly, the petitioner, through its resident agent, Brazil Export Corporation has regularly and systematically conducted a vital part of its business in this jurisdiction, namely, the purchase of raw materials in substantial quantities which were used to fabricate the finished products ultimately sold by the petitioner.

This view, that purchasing constitutes doing business as effectively as the solicitation of sales, was implicitly approved by Mr. Justice FRANKFURTER in his concurring decision in *United States* v. *Scophony Corp.*, 333 U. S. 795, in which he stated at page 819:

> "Whether a corporation 'transacts business' in a particular district is a question of fact in *its ordinary untechnical meaning*. The answer turns on an appraisal of the unique circumstances of a particular situation. And a corporation can be 'found' anywhere, whenever the needs of law make it appropriate to attribute location to a corporation, only if activities on its behalf that are more than episodic are carried on by its agents in a particular place. This again presents a question of fact turning on the unique circumstances

of a particular situation, to be ascertained as such questions of fact are every day decided by judges." (Emphasis supplied.)

The petitioner has cited the case of *Rosenberg Company* v. *Curtis Brown & Company,* 260 U. S. 518, as authority for the proposition that purchasing activities do not constitute the transaction of business upon which the service of process might be predicated. It is submitted that such a position is not well taken. The *Rosenberg* case can readily be distinguished from the instant case in that purchases were made by a transient buyer and not by a resident agent with offices in the State.

The Court of Appeals for the Second Circuit in the case of *Co-Ed Dresses, Inc.* v. *City of Paris Dry Goods Company,* 94 F. 2d 858, clearly pointed out this distinction. The following excerpt from its opinion is particularly relevant:

> "Though the appellee relies upon Rosenberg Brothers & Co. *v.* Curtis Brown Co., 260 U. S. 518, 43 S. Ct. 170, 171, 67 L. Ed. 372, to support the order, that case is distinguishable, in that the defendant had no local office or *resident buyers* but purchased in New York only through transient buyers. Some support is found in Hoffman, Inc. *v.* Mode Shoppe, Inc., 138 Misc. 742, 247 N. Y. S. 266, for the proposition that buying alone is not doing business, but that position was there taken on the authority of the Rosenberg Brothers Case, supra, which only decided the point in respect to transient buyers as above noticed.
>
> Though we are unwilling to put final decision of the present issue upon this record, *it might well be suggested that buying is an essential part of the business of a department store, and that were the surrounding circumstances were such that if sales were made business would be conducted locally, so would it appear to be by the making of purchases.* See Fleischmann Construction Co. *v.* Blauner's, 190 App. Div. 95, 179 N. Y. S. 193." (Emphasis supplied.)

The fact that some of the purchases made by Brazil Export Corporation on behalf of the petitioner herein were

made in states other than New York is completely immaterial. The vital point is that the negotiation for purchases emanated and were concluded from the offices of Brazil Export Corporation, the petitioner's resident agent, in this jurisdiction. *Kilpatrick* v. *Texas & P. Ry. Co.*, 166 F. 2d 788, cert. den. 335 U. S. 814.

The petitioner has advanced the contention that the existence of a purported arbitration clause in the contract *sub judice* "estopped" the respondent from initiating the present action in the District Court. The Court of Appeals refused to permit oral argument on this point on the ground that such argument was inconsistent with the petitioner's position. It is submitted that petitioner in attempting to advance such an argument has taken the inconsistent position of both denying the jurisdiction of a court and simultaneously requesting the same court to pass upon the interpretation and validity of an arbitration clause. The paradox of such a position is too apparent to require further discussion.

The petitioner also argues that the decision of the Court of Appeals in the instant case is in conflict with applicable decisions of the New York courts. Even if it were assumed *arguendo* that the decision of the Court of Appeals is inconsistent with the decisions of the New York courts, it is respectfully submitted that such a conflict would not be ground for review by this Court.

It is firmly established that a question pertaining to jurisdiction is a matter of general law to be decided independently by the Federal courts. *Southern Pacific Company* v. *Denton*, 146 U. S. 202. This proposition has in no way been altered by the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

The petitioner has cited the case of *Greenberg* v. *Lamson Brothers Co.*, 273 App. Div. 57 as illustrative of the inconsistency of the law of the State of New York with the decision of the Court of Appeals in the instant case. It is not amiss to point out that the *Greenberg* decision, not unlike the *Rosenberg* decision, is to be distinguished from the instant case on precisely the same ground.

In the *Greenberg* case the defendant did not maintain a buying agent of its own in the state, but employed a staff of transient buyers. It did, however, use certain rather minor technical services of a New York corporation which facilitated the buying activities of its transient buyers. The New York Court, in its opinion, expressly stated that the rule enunciated in the *Rosenberg* case was governing. It further stated, however, that the decision in no way conflicted with its previous decision upholding a service of process in a case in which the defendant had maintained its own purchasing agent in this district.

It is therefore submitted that even if it were to be assumed that the Federal courts were compelled to follow the decisions of State courts on questions of jurisdiction, the decision rendered in the instant case by the Court of Appeals is entirely consistent with the decisions of the courts of the State of New York.

CONCLUSION

The application for a writ of certiorari should be denied.

Respectfully submitted,

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September 19, 1949